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Exceptions to Public Lending Rights and Remuneration to Authors: CJEU's stance in *Vewa v Belgium*

Enrico Bonadio
City University London

Marco Bellezza
Portolano Colella Cavallo – Italy

On 30 June 2011 the Court of Justice of the European Union (CJEU) gave its decision in *Vereniging van Educatieve en Wetenschappelijke Auters (Vewa) v Belgium* (Case C-271/10). The CJEU interpreted Article 6(1) of Directive 2006/115, which allows Member States to derogate from the exclusive rights provided in respect of “public lending”, provided that authors receive a remuneration. It was held that such remuneration cannot be purely symbolic but it must be determined on the basis of the number of both the works made available and of the users of the public establishment suitable for the lending.

Legal context

On 30 June 2011 the Court of Justice of the European Union (CJEU) gave its decision in a case regarding public lending rights that originated from a Belgian litigation, i.e. *Vereniging van Educatieve en Wetenschappelijke Auters (Vewa) v Belgium* (Case C-271/10).

Before summarizing the legal provisions interpreted by the CJEU, it is worthwhile to preliminarily highlight the essence of the so-called lending rights. The concept of lending is clarified in Article 2(1)(b) Directive 2006/115 (“Directive”): “making available for use [...] when it is made through establishments which are accessible to the public”. And authors are given by Article 3(1)(a) *inter alia* the right to authorise or prohibit the lending of their works. Lending is not a lucrative activity as it should be carried “not for direct or indirect economic or commercial advantage” of the person to whom the lending right is granted (Article 2(1)(b) of the Directive). I give the following example. Take a public library willing to offer books-related services, and in particular to lend people books to be read outside the library itself, e.g. at their home, for a certain period of time. In order to do that, the public library should obtain from the author or the person to whom the lending right has been granted a specific authorization. And such lending activity, being no lucrative, cannot give the library an economic benefit which goes beyond what is necessary to cover the operating costs of the establishment (Recital 11 of the Directive).

Said that, in the present case the CJEU interpreted Article 5(1) Directive 92/100 (now Article 6(1) of the Directive 2006/115: hereinafter reference will be made to the latter). This provision allows EU Member States to derogate from the exclusive rights offered to authors in respect of “public lending”, provided that authors themselves receive a remuneration. Member States are free to quantify the amount of such remuneration taking into consideration their cultural promotion objectives. Member States can thus take advantage of this provision by allowing public establishments to make available to the public a wide range of works (e.g. books) without requesting

any authorization from the author (just a remuneration should be paid to the latter). The rationale behind such proviso is to incentivise and promote the diffusion of culture. Paragraph 3 of Article 6(1) of the Directive, moreover, provides that Member States may exempt certain categories of establishments from the payment of the remuneration.

These provisions had been implemented in Belgium by the Law of 27 July 1994 on copyright and related rights and by the Royal Decree of 25 April 2004. In particular, Articles 23(1) and 47(1) of the law provide that the authors cannot prohibit the lending of their works when such loan is organized for education and cultural purposes by public institutions and by organizations officially recognized for that aim by public authorities; however, authors must receive a remuneration for the loan of their works (Article 62(1)(2) of the law). What about its quantification? According to Article 4(1)(2) of the Royal Decree the amount of the remuneration is fixed on a flat rate basis at Euro 1 per year and per adult and at Euro 0,5 per year for each minor. The quantification is therefore based exclusively on the number of borrowers annually registered to the lending institutions. Article 4(3) of the decree also specifies that if a person is registered to more than one lending institutions the amount of remuneration must be paid just once.

Facts

The case originated from the request for annulment of the Royal Decree made by Vewa, the Belgian copyright management society, before the Belgian Council of State (Raad van State). According to Vewa the Royal Decree contravened the provisions of the Directive on remuneration. The Belgian Council of State decided to stay the proceedings and referred the case to the CJEU pursuant to Article 267 of the Treaty for the Functioning of the European Union. In particular, the Court was asked whether article 6(1) of the Directive prevents from establishing a remuneration whose amount is exclusively based on the number of the borrowers of the works.

Analysis of the decision

The CJEU focused its attention on three main issues: (i) who should pay the remuneration, (ii) its amount (iii) and the criteria of quantification.

Who should pay the remuneration?

The Court first noted that it is the making available of works by the public establishment, and not the actual loan of specific works by the persons registered with such establishment, that triggers the obligation to pay the remuneration due to the authors. It follows that the remuneration should be paid by the public establishment in question (paragraph 23 of the CJEU ruling). The validity of this conclusion – stressed the Court – is implicitly buttressed by Article 6(3) of the Directive, which permits Member States to exempt specific categories of lending establishments from the obligation to pay the remuneration (paragraph 24 CJEU ruling).

The amount of the remuneration

The CJEU preliminarily quoted the previous case *Sena* (Case 245/2000). In that case the Court had interpreted the concept of “equitable remuneration” referred to in another part of the Directive, i.e. in Article 8(2) regarding performers and phonogram producers’ rights. It had been held that the amount of the equitable remuneration should be quantified in light of the commercial value of the use of the copyrighted work (paragraph 32 CJEU decision). Yet the remuneration to be paid to authors in case of public lending is different from the one referred to in Article 8(2). Indeed, public lending does not have a commercial value, neither direct nor indirect: thus the amount of the remuneration cannot be based on the commercial value of the protected work, but should be lower (paragraph 33 CJEU decision). However, the Court also noted, the amount must nonetheless be capable of allowing authors to receive an adequate income and thus cannot be merely symbolic (paragraph 34 CJEU decision).

The criteria for quantifying the remuneration

Which are the criteria to be taken into consideration when it comes to quantifying the amount of the remuneration?

The CJEU first reminded us that Member States have a wide range of discretion in determining the remuneration and that regard should be given to their cultural promotion objectives (see Article 6(1) of the Directive and paragraphs 35 and 36 of CJEU decision). Despite of this freedom, the Court clarified that the amount of the remuneration to be given to the author cannot omit to take into consideration the harm suffered by the latter as a consequence of the lending of his works. It follows that such remuneration should take due account of the extent to which those works are made available to the public (paragraph 37 CJEU decision).

The CJEU thus held that not only a criterion based on the number of borrowers but also an “objective” parameter should be relevant in this specific regard. As previously mentioned, the first criterion is based on the number of borrowers annually registered to the lending institutions: the greater the number of persons accessing to the copyrighted works, the greater will be the prejudice to authors’ rights and the amount of the remuneration (paragraph 39 CJEU decision). Yet, this is not enough. The number of the copyrighted works made available to the public by a lending establishment should also be taken into consideration: the higher the number of copyrighted works made available to the public, the greater will be the prejudice suffered by authors (paragraph 38 CJEU decision).

It follows that the amount of the remuneration is too low in Belgium, where just a criteria based on the number of borrowers has so far been used for the quantification. The low level of the remuneration in this country is also a consequence of the application of Article 4(3) of the Belgian Royal Decree, which states that, where a person is registered with a number of establishments, the remuneration should be paid just once in respect of that person. As mentioned by the Belgian collecting society Vewa in the proceedings before the CJEU, a large number of persons registered with the lending establishments in the French speaking part of Belgium are also registered with other analogous establishments and accordingly a big number of readers are not taken into

consideration when quantifying the remuneration to be paid to the authors (see Article 4(3) of the Belgian Royal Decree and paragraph 41 CJEU decision). Under these circumstances, this scenario may lead to the result that many establishments are de facto exempted from the obligation to pay the authors the remuneration: which makes its total amount low and is also contrary to Article 6(3) of the Directive. This provision had been interpreted by the CJEU in *Commission v Spain* (C-36/05, paragraph 32): and in that case it had been held that only a limited number of categories of establishment potentially required to pay the remuneration can obtain the exemption from this obligation (see also paragraph 42 of CJEU decision).

Practical significance

The immediate consequence of this ruling is that the Belgian provision on remuneration in case of derogation of public lending rights is against EU copyright law and should therefore be modified by following the guidelines given by the CJEU in the present case. Indeed, if based on just the number of borrowers, the remuneration to be paid to authors is too low and does not rightly compensate authors for the unauthorised use of their works through public lending.

Another consequence of the finding that the remuneration is to be based also on the number of the works made available is that large public lending entities will pay in the future a higher remuneration than smaller establishments, as has also been mentioned by the CJEU in the ruling (paragraph 38).